

Number: **200743028**  
Release Date: 10/26/2007

In Re:

Person To Contact: \_\_\_\_\_, ID No. \_\_\_\_\_

Date:  
May 29, 2007

Grantor	=
Spouse	=
Trust	=

Appointed Property Trust	=
State 1	=
State 2	=
Partnership	=
State 2 Statute	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Year 1	=
Year 2	=
Year 3	=
A	=
B	=
C	=
D	=

This is in response to a letter dated October 20, 2006 submitted by your personal representative, and subsequent correspondence, requesting rulings under §§ 2601 and

2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

The facts submitted and the representations made are as follows. On Date 1, in Year 1, Grantor established an irrevocable trust (Trust) for the benefit of Grantor's daughter and her issue. Date 1 is a date that is before October 23, 1986 but after September 25, 1985.

Article One of Trust provides that Trust will terminate upon the later of Grantor's death or the death of Grantor's daughter. Upon termination, the trust estate will be distributed to Grantor's then living issue, per stirpes, if any; if none, to the then living issue (other than Grantor) of Grantor's mother, per stirpes. Article One further provides that, during the trust term, the trustees have the discretion to distribute net income and principal among Grantor's then living descendants. There is no requirement to equalize distributions among beneficiaries.

Article Seventh provides that the trustees have the power to change Trust's situs. On Date 1, Trust's situs was State 1.

On Date 1, Grantor transferred an A percent interest in Partnership to Trust. The partnership interest was valued at \$B. Grantor and his spouse (Spouse) retained an accounting firm to prepare their Year 1 Forms 709, United States Gift Tax Returns, reporting the Date 1 gift. On the Forms 709, Grantor and Spouse elected to treat gifts made by either in Year 1 as gifts made by both pursuant to § 2513.

On Date 2, in Year 2, Grantor transferred \$C in cash to Trust. Date 2 is a date that is before October 23, 1986 but after September 25, 1985. No Form 709 was filed reporting this gift because, due to a misunderstanding, Grantor failed to inform the accounting firm he hired to prepare his Year 2 tax returns of this gift. On or around Date 3, Grantor and Spouse filed Forms 709 reporting the Date 2 gift. On these returns Grantor and Spouse elected to treat gifts made by either in Year 2 as made by both pursuant to § 2513.

The applicability of the generation-skipping transfer (GST) tax to Trust and the failure to allocate GST exemption to the Date 1 and Date 2 transfers made to Trust was discovered in Year 3. It has been represented that Grantor and Spouse have allocated \$D of their respective GST exemptions to date.

On Date 4, the trustees changed Trust's situs to State 2. On Date 5, pursuant to State 2 Statute, the trustees appointed certain of Trust's assets to a new trust (Appointed Property Trust) the terms of which are virtually identical to Trust. On Date 6, pursuant to State 2 Statute, the trustees appointed cash from Trust to Appointed Property Trust. The trustees expect to make future appointments of assets from Trust to Appointed Property Trust.

State 2 Statute provides, in relevant part, that a trustee of an irrevocable inter vivos trust who has absolute discretion to invade the principal of the trust for the benefit of one or more proper objects of the trust, may appoint all or part of the principal of the trust to him or herself as the trustee of a trust other than that the trust over which the trustee has the power to invade principal, provided that the exercise of the trustee's discretion does not reduce any fixed income interest of any income beneficiary of the trust and is in favor of the proper objects of the trust. The trustee may make the appointment without prior court approval and without consent of any interested person.

The trustees of Trust are requesting the following rulings:

1. Grantor and Spouse are granted an extension of time pursuant to §§ 2642(g), 301.9100-1, and 301.9100-3, to allocate their available GST exemptions to the Date 1 and Date 2 transfers to Trust, and that the GST exemptions allocated to the transfers will be effective as of the date of each transfer.
2. Assuming ruling 1 is granted, Appointed Property Trust and Trust had the same inclusion ratio for GST tax purposes prior to the appointments, the appointments on Date 5 and Date 6 from Trust to Appointed Property Trust did not cause Trust's inclusion ratio to change, and any future appointments of assets from Trust (not made from any future additions to Trust) to Appointed Property Trust will not cause Trust's inclusion ratio to change.

Law and Analysis:

Ruling 1:

Section 2601 imposes a tax on every GST. A GST is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 26.2601-1(a)(1) of the Generation-Skipping Transfer Tax Regulations provides that, except as otherwise provided in this section, the provisions of chapter 13 apply to any GST (as defined in § 2611) made after October 22, 1986.

Section 26.2601-1(a)(2) provides that, solely for purposes of chapter 13, an inter vivos transfer is treated as if it were made on October 23, 1986, if it was (i) subject to chapter 12 (regardless of whether a tax was actually incurred or paid); and (ii) made after September 25, 1985, but before October 23, 1986. For purposes of this paragraph, the value of the property transferred shall be the value of the property on the date the property was transferred.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines "applicable rate" as the product of the

maximum federal estate tax rate and the inclusion ratio with respect to the transfer. Section 2642(a) provides the method for determining the inclusion ratio.

Section 2631(a) (in effect at the time of the transfer) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Section 26.2632-1(b)(2) provides that an allocation of GST exemption to property transferred during the transferor's lifetime, other than in a direct skip, is made on Form 709.

Section 2642(b)(1) provides that, except as provided in § 2642(f), if the allocation of the GST exemption to any transfers of property is made on a gift tax return filed on or before the date prescribed by § 6075(b) for such transfer or is deemed to be made under § 2632(b)(1) or (c)(1) – (A) the value of such property for purposes of § 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of § 2001(f)(2)), or, in the case of an allocation deemed to have been made at the close of an ETIP, its value at the time of the close of the ETIP, and (B) such allocation shall be effective on and after the date of such transfer, or, in the case of an allocation deemed to have been made at the close of an ETIP, on and after the close of such ETIP.

Section 2642(g)(1)(A) provides that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1)(A), which was enacted into law on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. Section 2642(g)(1)(B) further provides that for purposes of determining whether to grant relief, the time for making the allocation shall be treated as if not expressly prescribed by statute.

Section 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of the gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of the GST tax.

Notice 2001-50, 2001-2 C.B. 189, provides that under § 2624(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a GST trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) under the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1)(iii) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

In this case, Trust was established and the transfers to Trust were made before the enactment of the GST tax on October 22, 1986. Pursuant to §§ 26.2601-1(a)(1) and (2),

however, the transfers to Trust are deemed to have been made after the enactment of the GST tax.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Grantor and Spouse are granted an extension of time of sixty (60) days from the date of this letter to allocate their respective available GST exemptions to the transfers made to Trust on Date 1 and Date 2. The allocations should be made on supplemental Forms 709 for Year 1 and Year 2 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the returns.

#### Ruling 2:

Section 26.2601-1(b)(4)(i) provides that, in general, § 26.2601-1(b)(4) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax under § 26.2601-1(b)(1), (2), or (3) (herein referred to as an exempt trust) will not cause the trust to lose its exempt status. In general, unless specifically provided otherwise, the rules contained in this paragraph are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes. Thus (unless specifically noted), the rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(D)(1) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy § 26.2601-1(b)(4)(i)(A), (B), or (C)) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

Section 26.2601-1(b)(4)(i)(D)(2) provides that for purposes of this section, a modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer. To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or

persons who held the beneficial interest prior to the modification. A modification that is administrative in nature that only indirectly increases the amount transferred (for example, by lowering administrative costs or income taxes) will not be considered to shift a beneficial interest in the trust.

Section 26.2601-1(b)(4)(i)(E), Example 2 provides as follows. In 1980, Grantor established an irrevocable trust (Trust) for the benefit of Grantor's child, A, A's spouse, and A's issue. At the time Trust was established, A had two children, B and C. A corporate fiduciary was designated as trustee. Under the terms of Trust, the trustee has the discretion to distribute all or part of the trust income or principal to one or more of the group consisting of A, A's spouse or A's issue. Trust will terminate on the death of A, at which time, the trust principal will be distributed to A's issue, per stirpes. Under a state statute enacted after 1980 that is applicable to Trust, a trustee who has the absolute discretion under the terms of a testamentary instrument or irrevocable inter vivos trust agreement to invade the principal of a trust for the benefit of the income beneficiaries of the trust, may exercise the discretion by appointing so much or all of the principal of the trust in favor of a trustee of a trust under an instrument other than that under which the power to invade is created, or under the same instrument. The trustee may take the action either with consent of all the persons interested in the trust but without prior court approval, or with court approval, upon notice to all of the parties. The exercise of the discretion, however, must not reduce any fixed income interest of any income beneficiary of the trust and must be in favor of the beneficiaries of the trust. Under state law prior to the enactment of the state statute, the trustee did not have the authority to make distributions in trust. In 2002, the trustee distributes one-half of Trust's principal to a new trust that provides for the payment of trust income to A for life and further provides that, at A's death, one-half of the trust remainder will pass to B or B's issue and one-half of the trust will pass to C or C's issue. Because the state statute was enacted after Trust was created and requires the consent of all of the parties, the transaction constitutes a modification of Trust. However, the modification does not shift any beneficial interest in Trust to a beneficiary or beneficiaries who occupy a lower generation than the person or persons who held the beneficial interest prior to the modification. In addition, the modification does not extend the time for vesting of any beneficial interest in Trust beyond the period provided for in the original trust. The new trust will terminate at the same date provided under Trust. Therefore, neither Trust nor the new trust will be subject to the provisions of chapter 13.

No guidance has been issued concerning changes that may affect the status of trusts that are exempt from GST tax because sufficient GST exemption was allocated to the trust to result in an inclusion ratio of zero. At a minimum, a change that would not affect the GST status of a grandfathered trust should similarly not affect the exempt status of such a trust. In this case, State 2 Statute is similar to the provisions of the state statute cited in Example 2 of § 26.2601-1(b)(4)(i)(E). In addition, the actions of the trustees in this case are similar to those actions set forth in Example 2 of § 26.2601-1(b)(4)(i)(E).

Therefore, based upon the facts provided and the representations made, we conclude that Appointed Property Trust and Trust had the same inclusion ratio for GST tax purposes prior to the appointments, the appointments on Date 5 and Date 6 from Trust to Appointed Property Trust did not cause Trust's inclusion ratio to change, and any future appointments of assets from Trust (not made from any future additions to Trust) to Appointed Property Trust will not cause Trust's inclusion ratio to change.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied as to the value for Federal transfer tax purposes of any transfers made to Trust.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

William P. O'Shea

William P. O'Shea  
Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures: Copy for § 6110 purposes